**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JON MICHAEL BIBB**<br>Claimant<br><br>VS.<br><br>**BUTLER TRANSPORT, INC.**<br>Respondent<br><br>AND<br><br>**KS. TRUCKERS RISK MGMT. GROUP**<br>Insurance Carrier | ) | Docket No. 1,016,890 |

## ORDER

Respondent and its insurance carrier request review of the November 19, 2004 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

## ISSUES

At the preliminary hearing held November 16, 2004, the claimant was seeking medical treatment and temporary total disability compensation as a result of accidental injuries suffered February 16, 2004. The compensability of that accident was not denied but respondent argued claimant had suffered an intervening accident on September 16, 2004 while working for a different employer.

The Administrative Law Judge (ALJ) found claimant's pain complaints and need for medical treatment was the direct and natural consequence of his February 16, 2004 accident.

The respondent requests review of whether claimant's current condition is a direct and natural result of the February 16, 2004 accident or due to an intervening injury with another employer. Respondent argues the claimant received medical treatment for the February 16, 2004 accident and had been released to return to work with no restrictions. Respondent further argues the claimant suffered an intervening injury at work with a

different employer on September 16, 2004. After the claimant suffered the alleged second injury claimant was unable to return to work.

Claimant argues his symptoms never resolved after the February 16, 2004 accident and his condition is the natural and probable consequence of the injuries suffered in that accident. Accordingly, the claimant requests the Board to affirm the ALJ's Order.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a utility mechanic for respondent and his duties included general repair, engine rebuilds as well as trailer overhauls. During the course of claimant's employment, he developed pain symptoms bilaterally in his wrists, hands and elbows. On June 10, 2004, claimant underwent a right carpal tunnel release and on July 29, 2004, a left carpal tunnel release.

Claimant was provided physical therapy and at his physical therapy appointment on September 1, 2004, the therapist recommended claimant have additional therapy for his left hand. The wrist progress note from the therapist dated September 1, 2004, indicated claimant had shown 40 percent improvement but noted claimant had difficulty opening lids, griping and holding heavy items with his left hand.[1] Claimant described his pain as constant. Finally, the note indicated continued therapy would be provided if the doctor agreed.

On September 2, 2004, Dr. Peter I. Vilkins, the treating physician, released claimant from further treatment with the comment for the claimant to return on an as needed basis. The doctor's note indicated claimant was doing quite well, with little, if any, discomfort and with good strength.[2] The claimant was released to regular duty without restrictions.

Claimant contacted his employer, explained he had been released to return to work and requested a call back regarding his work schedule. When claimant did not hear from respondent he accepted employment with another employer. Claimant began that employment on September 7, 2004.

Claimant noted he was still having pain and problems primarily with his left hand when he returned to work for his new employer. Claimant further noted he experienced

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[1] P.H. Trans., Ex. 1.

[2] Id.

pain as he attempted to work for his new employer and that is the reason he left work after approximately one week.

But claimant agreed that on September 16, 2004, as he was working on a ladder it started to move and he grabbed the ladder with his left hand. Claimant immediately experienced left hand pain so severe it caused him to urinate. Claimant saw Dr. Vilkins that day and was provided restrictions against repetitive use of his left upper extremity. The doctor also ordered an EMG study and then referred claimant to another physician.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity at Lenny's aggravated, accelerated or intensified the underlying disease or affliction.[3]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[4], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[5], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[3] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig*[6], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[7], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's carpal tunnel condition, while improved, had not completely resolved. Although claimant had been released to regular duties by his treating physician, claimant had contemporaneously told his physical therapist that he continued to experience constant pain and was having difficulties using his left hand. Claimant testified he experienced continued pain when he attempted to return to work for his new employer. Claimant was only able to attempt to work for approximately a week before seeking additional treatment.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Accordingly, the Board affirms the ALJ's Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[8]

**WHEREFORE**, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated November 19, 2004, is affirmed.

**IT IS SO ORDERED.**

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[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[8] K.S.A. 44-534a(a)(2).

Dated this _____ day of January 2005.

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BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Todd E. Cowell, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director